No. 22,560

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PSG CO., a corporation,
and PHILIP S. GREENBERG,

Appellants,

v.

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

THE HONORABLE ROBERT C. BELLONI, Judge

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Statement of Issues Presented for Review

The broad question raised by appellants (herein collectively called Greenberg) on this appeal is: Did the trial court err in dismissing Greenberg's cause of action for the alleged loss of future profits resulting when appellee (herein called Merrill Lynch) as a broker declined to accept further employment by Greenberg for the placement of orders for new sugar futures contracts?[1]

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1 For a discussion of terms used in the commodity market, see Appendix A.

The principal substantive issues are:

1. In the absence of agreement, is the broker-customer relationship as to the placement of new contracts in the sugar future commodity market terminable immediately at will by either party upon the giving of notice?

2. Was there evidence of a binding agreement between Merrill Lynch and Greenberg which obligated Merrill Lynch to continue to place orders for new sugar futures contracts?

3. If there was no evidence of such binding agreement, was there evidence of a promise and reliance thereon which obligated Merrill Lynch under the doctrine of promissory estoppel to continue to place new orders for Greenberg after notice and until Greenberg obtained another broker?

4. Did Greenberg produce any probative evidence of damages resulting from the refusal of Merrill Lynch to accept further employment by Greenberg to place orders for new sugar future contracts?

Other issues raised by Greenberg are:

a. Was a procedural error committed by the trial court in granting Merrill Lynch's motion "for dismissal" upon the conclusion of Greenberg's case in chief?

b. Was Greenberg's claim for punitive damages properly removed by the trial court from the consideration of the jury?

c. Did the trial court abuse its discretion in refusing permission to Greenberg to amend his pleadings to assert a claim for violation of the anti-trust laws?

Statement of the Case

Merrill Lynch deems the statement of the case by Greenberg to be inaccurate and incomplete, and therefore makes the following statement:

A. Nature of the case.

This is an action by Greenberg against Merrill Lynch, a stock and commodities broker, for breach of contract.

In the pretrial order (which by stipulation superseded the pleadings in this case), Greenberg contended that in March, 1965, he entered into an agreement with Merrill Lynch whereby Merrill Lynch agreed to place Greenberg's orders to purchase or sell sugar futures contracts up to stated maximum limits. (R.60) Greenberg claimed that there was a custom in the industry to give reasonable advance notice before reducing such trading limits, and that Merrill Lynch wrongfully terminated the agreement in October, 1965, by refusing to place new orders without giving him reasonable advance notice. (R. 61, 62)

Greenberg asserted that by reason of Merrill Lynch's refusal to place orders for new transactions, Greenberg was prevented from making profits on such transactions, and that Merrill Lynch's conduct in terminating the agreement was such as to entitle Greenberg to exemplary damages. (R. 62)

Merrill Lynch contended that it was under no obligation imposed by law to continue its employment as a broker for the placement of orders by Greenberg, and that there was no express or implied contract which obligated it in any way to continue to place orders to purchase or sell sugar futures contracts for

Greenberg. Merrill Lynch further contended that regardless of whether or not it breached a duty owed to Greenberg, Greenberg did not incur any damages. (R. 64)

Both Greenberg and Merrill Lynch made contentions as to certain other claims, but such claims were settled by agreement and are not involved in this appeal.

In the pretrial order Greenberg did not make any contention with respect to a claim against Merrill Lynch under the Robinson Patman Act. (R. 60-63)

B. Course of proceedings and disposition in trial court.

The cause proceeded to trial before a jury on the issues framed by the pretrial order.

At the end of the first day of trial the court, after inquiring of Greenberg's counsel as to his evidence on the punitive damage issue, granted Merrill Lynch's pretrial motion to remove the issue of punitive damages from the case. (Tr. 107-113)

At the conclusion of Greenberg's case, the court granted Merrill Lynch's motion "to dismiss" Greenberg's claim. (Tr. 270) The parties thereafter disposed of their remaining claims against each other by stipulation.

In ruling on the motion, the court remarked that there was no evidence under which the jury could conclude that Merrill Lynch had promised that any "limits" it fixed would continue for any period. (Tr. 269)

The court noted that the testimony with respect to the custom of the industry in giving notice in these circumstances was not helpful to Greenberg's case. (Tr. 269) Although there

was testimony that when "limits" are reduced by a broker a reasonable time is given a customer to liquidate, Greenberg's testimony also was that a reasonable time to liquidate had been given. (Tr. 269) On the issue of whether a broker can decline to accept employment to place further orders for new commodity future contracts, Greenberg's "expert" testified that in his own experience a broker can decline to accept employment for the placement of new orders any time. (Tr. 150)

The court concluded that even though there was no express agreement between the parties it might be possible to find that Merrill Lynch's promise to "carry" up to 300 contracts "open" for Greenberg was binding on the theory of promissory estoppel, but that under Greenberg's evidence Merrill Lynch had not promised to hold the "limits" open forever--the "limits" could be terminated in accordance with the custom of the trade, and there was no evidence that they were terminated in any other way. Accordingly, the court granted the motion on the ground that there had been no breach of agreement and on the further ground that the evidence of damages based on loss of future profits was purely speculative.

C. Statement of facts.

Philip Greenberg is the sole stockholder and principal officer of PSG Co. (R. 49) Since 1963, both Philip Greenberg and PSG Co. (together referred to as Greenberg) have been engaged in the business of buying and selling "futures" contracts on the commodity exchanges. (R. 49) In addition, Greenberg has handled actual shipments of sugar from the Association of

Guatemala Sugar Producers and El Salto, SA, for the United States and the world markets. (R. 49) Greenberg's operations with the above-named sugar producers involved the sale and delivery of "actual" cargoes of sugar. (R.49)

In October, 1963, Greenberg became a member of the New York Coffee and Sugar Exchange. (R. 49)

Merrill Lynch is a securities and commodities broker. It is a member of the New York Stock Exchange as well as of the principal commodity exchanges in the United States, London and world markets. (R. 50) As a broker, Merrill Lynch's business is to place orders received from its customers for the purchase and sale of securities or futures contracts on the exchanges where they are traded. (R. 50) In its commodity operation, Merrill Lynch derives its income solely from the commissions which it charges for the execution of customers' orders. (R. 50)

The New York Coffee and Sugar Exchange, Inc. (hereinafter referred to as Exchange), is a corporation organized pursuant to the laws of the State of New York. (R. 50) Among other things, it provides a market place for trading coffee and sugar futures contracts. The New York Coffee and Sugar Clearing Association, Inc. (hereinafter referred to as Clearing Associati[on]) is a New York corporation organized to clear and settle trades made on the Exchange. (R. 50)

The Exchange sets certain minimum margin requirements which customers of clearing members must maintain. (R. 51) A clearing member is a member of the Exchange who is also a member of the Clearing Association. (R. 51) Merrill Lynch, at all relevant times, was a clearing member of the Exchange. (R. 51)

In 1963 Greenberg opened accounts with Merrill Lynch for the placement of orders for the purchase and sale of stocks and commodities on margin. (R. 53, 54) In opening the accounts, Greenberg executed a hypothecation (lending) agreement. (R. 52-53)

At no time during the course of opening his accounts or thereafter did Greenberg tell Merrill Lynch that he would not trade with any other broker (Tr. 186), or that he would place any particular amount of business through Merrill Lynch. (Tr. 187) Greenberg did not tell Merrill Lynch that he would not give another broker all or part of his commodity business (Tr. 187), and the period of time Merrill Lynch was to act as Greenberg's broker was never discussed or defined. (Tr. 187)

At the time Greenberg's accounts were opened in 1963, Merrill Lynch informed Greenberg of the account "limits," i.e., the number of sugar futures contracts it would "carry" on "margin" at any one time in plaintiff's accounts. The "limits" were revised upwards by Merrill Lynch at various times, and by 1965 the "limits" on plaintiff's combined accounts were 100 contracts "straddled" and 100 contracts "open." (Tr. 20, 22)

In late 1964, Greenberg, through Merrill Lynch as broker, began purchasing May 1965 No. 8 sugar futures contracts. (R. 54) Greenberg conferred with his account executive at Merrill Lynch in Portland, Oregon, on several occasions starting in late 1964, in connection with the transaction, and told him that he intended to take actual delivery of sugar represented by commodities contracts purchased through the Exchange in order to

fill the import quota of certain Guatemalan companies he was representing in the United States. (Tr. 28) Ultimately, after several discussions, Greenberg stated that he would need sugar represented by 300 contracts to import into Guatemala. Merrill Lynch told him it would handle the matter and "take delivery." (Tr. 29) As it developed, Greenberg finally acquired 284 such contracts.

Greenberg held the 284 contracts of May 1965 No. 8 sugar until the last day for trading in the May 1965 contract expired. Delivery notices were then issued for the 284 contracts of May 1965 No. 8 sugar. By such delivery notices, under the rules of the New York Coffee and Sugar Exchange, such contracts were removed from trading, and Greenberg became obligated to accept delivery of the sugar covered by the 284 contracts (14,200 long tons of raw sugar). (R. 54-55)

On June 8, 1965, Greenberg transferred 196 of such contracts in connection with a sale of actual sugar to Amerop, another firm engaged in the sugar trading business. (R. 55) On June 10, 1965, Greenberg sold an additional 48 of the 284 contracts, leaving only 40 as to which Greenberg was obligated to accept delivery. (R. 55) Thereafter, on June 16, 1965, Greenberg sold "short" 40 July 1965 No. 8 sugar contracts and re-tendered the sugar represented by the remaining 40 contracts of May sugar in satisfaction of his obligations to deliver July No. 8 sugar. (R. 55)

When Greenberg was in New York, on June 7, 1965, he visited Merrill Lynch's offices. Greenberg met Mr. Cassady, the

head of Merrill Lynch's Commodity Department, for a few minutes. Greenberg testified as to this conversation with Mr. Cassady:

> "Q All right. I want you to tell the jury as near as you can what each party said of the three of you at that meeting?
>
> "A I -- Mr. Cassady introduced me to Mr. Frommer, and he discussed my last trip and the current trip. And the next inquiry was, 'What are you going to do about the sugar, the cash sugar?' I said, 'Well, we transferred it off yesterday, 196 lots.' Mr. Frommer smiled, shook hands, and said, 'That's all I want to know,' and out he walks. Mr. Cassady invited me to sit down. He had his couch there, and we started discussing it; and he discussed, as I recall, that he was from Indiana, and wanted to know if every thing was all right. I said, 'Fine.' He asked me if Portland was taking good care of me, and I said 'Yes.' He asked me if my limits of 300 were satisfactory. I said, 'Yes, they were.' And he said, 'Fine.'" (Tr.41)

(The foregoing apparently is the prime evidence relied on by Greenberg to support his theory of promissory estoppel.)

During the summer of 1965, Greenberg continued to place orders for the purchase and sale of sugar futures contracts with Merrill Lynch, and Merrill Lynch continued to accept and execute those orders. (R. 56) Beginning in August, Greenberg's accounts increased rapidly in size so that by October the number of future contracts in the accounts was far in excess of the "limits" which existed in early 1965. (R. 56)

On the evening of October 21, 1965, Richard Emlaw, the Merrill Lynch account executive in Portland, Oregon, who handled Greenberg's accounts, unsuccessfully attempted to contact Greenberg by telephone. (R. 57) Emlaw met Greenberg the following morning at about 6:15 and told him that effective immediately Merrill

Lynch was going to limit Greenberg's accounts to liquidating orders only until the number of contracts in his accounts was reduced to 100 "open" and 100 "straddled." (Tr.48) On that date Greenberg's position was 190 contracts "straddled" and 207 contracts net "open" long; i.e., 587 contracts, of which 397 were "long" and 190 were "short."

After Greenberg received the oral notice from Emlaw, he requested that the position of Merrill Lynch be placed in writing. Joseph J. DuLong, the manager of Merrill Lynch's Portland office, thereupon confirmed Merrill Lynch's position that it would decline to accept orders for new sugar futures contracts until the "limits" of 100 "straddle" and 100 "open" contracts were reached but that it would continue to handle any orders which Greenberg desired to place to liquidate his existing contracts. (R. 57-58)

After such notice and until November 3, 1965, Greenberg attempted to place various orders for new sugar futures contracts with Merrill Lynch, but such orders were declined. These orders were never placed by Greenberg with another broker. (Tr. 51-54) Miss O'Connor, Greenberg's secretary, testified that if the orders had been accepted and executed by Merrill Lynch the paper book value of such orders, valued as of November 1, 1965, would have appreciated by $45,821. (Tr. 220-223)

On November 3, 1965, Greenberg commenced to purchase and sell sugar futures contracts through Francis I. duPont & Co. (Tr. 65)

Greenberg continued after the notice of October 22, 1965, to place <u>liquidating</u> orders for the purchase and sale of his existing sugar futures contracts with Merrill Lynch until February 10, 1966. On February 10, 1966, the remaining sugar futures contracts in Greenberg's accounts were transferred at Greenberg's request to Greenberg's new broker. (R. 58)

<u>Argument</u>

A. <u>Summary of argument</u>.

1. The trial court did not err in directing a verdict for Merrill Lynch at the close of Greenberg's case in chief because:

a. Greenberg presented no evidence of a contractual obligation requiring Merrill Lynch to continue as a broker for Greenberg for the placement of orders for <u>new</u> sugar futures contracts.

b. Greenberg presented no evidence sufficient to support Greenberg's theory of promissory estoppel.

c. Greenberg presented no evidence sufficient to support Greenberg's claim that Merrill Lynch breached any duty which it owed to Greenberg.

d. Greenberg presented no evidence of compensable damages.

2. The trial court did not err in removing the issue of punitive damages because:

a. Exemplary damages may not be awarded for breach of contract.

b. No fiduciary relationship existed between Greenberg and Merrill Lynch.

c. There was no evidence of malice or of aggravating circumstances.

3. The trial court did not abuse its discretion in denying Greenberg's motion to amend his complaint to add a claim for violation of the anti-trust laws because:

a. The motion was made 19 months after the complaint was filed and at a time when the issues had been framed, discovery completed and the case set for trial the following month.

b. The proposed amendment was not in any way connected with the issues then framed.

c. Greenberg would not be prejudiced by the denial of the motion.

B. <u>Contentions and argument of Merrill Lynch</u>.

POINT I

THE TRIAL COURT PROPERLY DIRECTED A VERDICT FOR MERRILL LYNCH AT THE CLOSE OF GREENBERG'S CASE IN CHIEF.

1. <u>Merrill Lynch's motion was properly treated as a motion for a directed verdict under Rule 50A</u>.

At the close of Greenberg's case, counsel for Merrill Lynch moved "for the dismissal" of Greenberg's claim for breach of contract (Tr. 248) and stated specific grounds therefor. (Tr. The court granted the motion (Tr. 270) and thereafter entered a form of judgment reciting that Merrill Lynch had moved the court for a directed verdict and that such motion was granted. (R. 87-

Greenberg argues that the court's action was procedurally improper because a "motion to dismiss" may be granted only in a nonjury case. Greenberg asserts that, even were the motion available in a jury case, the court failed to make specific factual findings required by Rule 41(b), FRCP, and consequently there is no support for the judgment.

Greenberg's argument boils down to the claim that the district court should be reversed because counsel did not use the magic words "directed verdict" in making the motion. The fact that Greenberg finds it necessary to assert this argument is a strong indication that Greenberg's search for legitimate grounds for appeal went unrewarded, for it is well settled that a motion for dismissal made in a jury case may properly be treated as a motion for a directed verdict under Rule 50A. See e.g.,

Wolf v. Reynolds Electrical &
Engineering Co. (9 Cir, 1962)
304 F2d 646

Carroll v. Seaboard Air Line
Railroad Company (4 Cir, 1967)
371 F2d 903

The argument that the district court erred in failing to make factual findings is likewise totally without basis in the law. It would have been improper for the district court to make findings in a jury trial.

Wolf v. Reynolds Electrical & Engineering Co., supra, at 648-649

> "Where a motion for dismissal is made pursuant to Rule 41(b) in a jury case, it may properly be treated as a motion for a directed verdict under Rule 50(a). The trial court does not determine the facts, but simply

determines whether plaintiff has made a 'case for the jury'. He does not weigh the evidence, draw inferences therefrom, or evaluate the credibility of witnesses, as he may do in a nonjury case where the judge is the trier of the facts. The procedural error of the trial court in making findings of fact in this case may be disregarded in view of the court's conclusion that there was 'no evidence that defendants, or either of them, were negligent in the operation of their truck and trailer, and upon that ground plaintiff's complaint should be dismissed * * *'. If this conclusion is correct, the judgment must be sustained as a matter of law." (emphasis supplied)

The cases cited by Greenberg are not contrary to the principles stated above. See

Mateas v. Fred Harvey
(9 Cir, 1945) 146 F2d 989

Young v. United States
(9 Cir, 1940) 111 F2d 823

Both Mateas and Young were tried to the court without a jury. In Mateas, the court's oral remarks were taken by the appellate court as findings, though findings should have been made as contemplated by Rule 52A of the Federal Rules of Civil Procedure. In the Young case, findings were made by the trial court and were upheld on appeal. Thus, these cases simply restate the requirements of Rule 52 that, in cases tried without a jury, the court should make findings of fact.

The remaining case cited by Greenberg

Guerrero v. American-Hawaiian Steamship Company (9 Cir, 1955) 222 F2d 238

is hardly relevant here. In that case, this court properly held that a district court could not determine disputed issues of fact, based upon evidence presented at a jury trial, after the

jury had been dismissed for failing to reach a verdict. It has no bearing here because the district court did not make findings after dismissing the jury, but simply determined that there was no factual issue to submit to the jury.

2. <u>In the absence of agreement, Merrill Lynch was entitled at any time to decline to accept orders for new sugar futures contracts</u>.

Greenberg's claim of procedural error has been used to set up a circuitous argument on which to base an attack on the district court's disposition of the substantive issues. Greenberg's argument runs that factual findings should have been made by the trial court; that in the absence of formal findings the comments of the court can be taken as findings; and that the trial court <u>cannot</u> make findings of fact in a jury case unless there is <u>no evidence</u> on which a jury could base a contrary finding. (Appellant's Brief 7-8)

The net proposition advanced by this argument appears to be that the district court erred in taking the case from the jury if there was a scintilla of evidence to support Greenberg's claims. That proposition, however adroitly presented, is incorrect. The federal courts have long since abandoned the scintilla test, and have ruled that verdicts may properly be directed where there is no controverted issue of fact on which reasonable men could differ.

> Brady v. Southern R. Co. (1943)
> 320 US 476, 88 L ed 239
>
> Shafer v. Mountain States Tel. &
> Teleg. Co. (9 Cir, 1964) 335 F2d 932

There is no question but that the "reasonable man" standard was the proper standard to use in this case, and that it was correctly applied by the trial court. The trial court did not attempt to determine disputed issues of fact. It simply ruled that there was no evidence of breach of contract and no evidence of damages. In so ruling, the district court correctly determined that under familiar principles of agency law the relationship between Greenberg and Merrill Lynch was terminable at will, and that Greenberg had failed to produce evidence of any contractual undertaking to vary the general principles of law.

Under established principles of agency law, Merrill Lynch clearly was under no obligation to place orders for new purchases or sales of sugar futures contracts for Greenberg. A broker has an obligation to carry out an order for his customer only if he has accepted and agreed to execute the particular order. When the particular order is completed, however, the relationship comes to an end and the broker has no further duties. Thus, a broker may decline future employment at any time without prior notice, even though he has carried out a previous series of transactions for his customer.

<u>Meyer, Stockbrokers and Stock Exchanges, Section 44, pages 263-264</u>

> "The first step in the execution of an order is the employment of the broker by the customer for that purpose. There can be no agency without employment. A broker may not execute an order on behalf of a customer without the customer's authority, and if he does so the customer may repudiate the execution.

"In the same way the customer cannot compel the broker to execute an order, the broker having the right to decline employment. However, if the broker is carrying a marginal account for the customer, he must, if he wishes to decline the agency, give the customer prompt notice of declination. Notice in such a case is required because the broker has already accepted employment, and must therefore follow his principal's instructions unless he elects to bring the employment to an end, in which case he must give proper notice of such election. <u>But if there are no transactions pending between the broker and the customer at the time, the broker is not under a duty to give notice of declination, even though there had been transactions pending at an earlier date</u>.

"Employment of the broker by the customer may be created by the customer giving the broker an order and by the broker executing it or agreeing to execute it. <u>This in fact is the manner in which a broker ordinarily is employed</u>." (emphasis added)

There was no order pending from Greenberg on October 22, 1965, when Merrill Lynch gave notice that it would not place further orders for new contracts. Greenberg <u>thereafter</u> attempted to place orders for new contracts which Merrill Lynch declined to accept. Because notice of declination was given before Greenberg attempted to place such new orders, there was no factual issue as to whether Merrill Lynch had given prompt notice.

Even if Greenberg had placed an order before notice was given, the broker-customer relationship could have been effectively terminated by giving immediate notice of declination. Such notice to be effective must only be transmitted by means as rapid as that by which the order was given.

The United States Supreme Court, in discussing the rights of the parties with respect to a brokerage account on margin, stated in

Galigher v. Jones (1889) 129 US 193, 32 L ed 658

> "* * * A broker is but an agent, and is bound to follow the directions of his principal, or give notice that he declines to continue the agency. * * * The plaintiff should have given prompt notice that he objected and declined to make the change." (p. 198)

The fact that Greenberg had a credit balance in his accounts and that Merrill Lynch had acted as his broker on prior occasions does not modify the principle that Merrill Lynch had no obligation to place future orders. Each order submitted by a customer to a broker, even if there is a credit balance in the customer's account with the broker, is nothing more than an offer to enter into an agency relationship, which the broker is free to decline. See Meyer, supra, Vol. 2, wherein the author states at page 103, footnote 2, citing Blyth v. White (Ga, 1934) 176 SE 830:

> "A broker is not obligated to accept an order of a customer for execution, even if the customer has a credit balance with the broker."

To the same effect see

Robinson v. Ungerleider (Pa, 1933) 169 A 886, 887-888

In the Robinson case, plaintiff placed an order with defendants for the purchase of various stocks, and stipulated the prices at which purchases were to be made. Some $16,000 in bonds was deposited with defendants to secure the loans necessary at the time the order was given.

On October 29, 1929, the day of the Great Panic, defendants notified plaintiff that they would not carry out his order and that they had canceled it. At the time defendants

gave notice of cancellation, only one stock had reached plaintiff's stipulated purchase price. In holding that the defendants' agency had been properly terminated, the court stated,

> "Agency is a voluntary relationship, and may generally be terminated at will by either party. 'Where the agency is indefinite in duration the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal.' Mechem on Agency, p. 456. Meyer (p. 263) recognizes the right of the broker to decline to execute an order at any time upon giving prompt notice. This is true even in those cases where the broker is carrying a marginal account for the customer.
>
> "The reports contain few cases of a refusal by the broker to execute an order. In most of the cases, the broker has neglected to execute the order and has not given notice that he refuses to do so. The reason for this is apparent from a consideration of the fact that the broker's only compensation accrues from his commission when the transaction is made. * * * It has always been recognized that the customer or principal may cancel an order or withdraw his authority at any time before the order is executed, and this is true whether the contract covers real estate, stocks, or other property. Coffin v. Landis, 46 Pa. 426, 433; Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 38 Am. Rep. 441; Matter of Dickinson, 171 App. Div. 486, 157 N.Y.S. 248. It would seem equitable to allow the agent the same privilege to refuse to execute an order as is possessed by the principal. The defendant in the instant case <u>gave immediate notice</u> to the plaintiff by telephone of its decision to refuse the order, and the plaintiff's collateral was returned to him the same day upon request." (emphasis added)

See also

<u>Busch v. L. F. Rothschild & Co. (1965) 259 NYS2d 239, 240</u>

> "* * * A stockbroker is an agent for the customer. Unless he accepts the agency he has no duty to execute any order and may refuse to do so (Meyer, Law of Stock Brokers and Stock Exchanges, vol. 1, p. 249). The relationship is not changed by the fact that there is a margin account. The duty in such case is to give <u>prompt notice</u> that the order is refused." (emphasis added)

Greenberg cites certain authorities which, on first blush, appear to take a conflicting position. In fact, such cases deal with the relationship of pledgor-pledgee, which is not in issue here, and they are for that reason of no support for Greenberg's position.

A broker and his customer may enter into a number of relationships in the course of their dealings, some of which are terminable at will without notice and some of which may only be terminated with reasonable notice.

> Meyer, Law of Stockbrokers and
> Stock Exchanges, Section 41(3)

The claim asserted in the case at bar was for loss of future profits on new purchases or sales Greenberg claimed he would have made had Merrill Lynch placed his orders, and not for wrongful disposition of commodities contracts presently held in his accounts. Greenberg's trial counsel admitted that no claim for conversion was being asserted in this case, and Greenbe testified that Merrill Lynch had not forced him to liquidate and had given him a reasonable time to reduce his accounts and transfer his contracts to his new broker. Even if this had been a case for conversion or wrongful sale, Greenberg expressly waived any such notice requirement when opening his accounts with Merrill Lynch. (R. 52-53) Accordingly, we are not concerned in this case with the pledgor-pledgee relationship, but solely with the broker-customer relationship.

In summary, the law requires only that the broker give prompt notice of declination of an order. The duty to give

"prompt" notice is satisfied if it is transmitted by a means as rapid as that by which the order was transmitted from the customer to the broker. Cf.

Galigher v. Jones, supra

See,

Meyer, supra, Section 47, page 268

As the relationship of broker-customer is terminable immediately upon notice, Greenberg had the burden of establishing a contractual undertaking on the part of Merrill Lynch which varied the established principles of agency law and imposed a duty to continue to act as broker for a particular period of time.

We turn now to the question of whether the evidence shows such contractual undertaking on the part of Merrill Lynch.

3. Greenberg presented no evidence of any express or implied agreement obligating Merrill Lynch to accept Greenberg's orders.

Greenberg undoubtedly realized that the relationship between broker and customer terminates with the execution of each order, and that he was obligated to show that any continuing obligation on the part of Merrill Lynch to place his orders could only arise from contract, for his pretrial contentions alleged the breach of a specific contract. (R. 60-61) At trial, however, Greenberg expressly conceded that there was no evidence of such agreement. (Tr. 251)

The renewed argument on this appeal that there was an agreement between the parties flies in the face of the facts, and of Greenberg's admissions at trial. Greenberg's concession recognized that the testimony he had been given "limits" of up to 300 "open" contracts in his accounts could at best only be construed as a promise to accept and execute orders from time to time, and that such "promise" could not have risen to the dignity of an enforceable promise or contract because of a complete want of consideration. See

> 1A Corbin on Contracts,
> Section 157, page 40

The "promise" to carry up to 300 contracts in Greenberg's account, of course, is most accurately characterized as an offer which empowered the offeree (Greenberg) to create a series of separate contracts. The mere sending in of an order, however, did not make the offer irrevocable as to future orders.

An offer to place future orders could have been made an enforceable promise only if some consideration had been bargained for and given in exchange. A bilateral contract, instead of an offer to enter into a series of contracts, could have been formed if Greenberg had paid a sum of money for the promise, had agreed to place a minimum number of contracts, or had agreed to place his orders exclusively with Merrill Lynch. Compare

> Meier Dental Mfg. Co. v. Smith
> (8 Cir, 1916) 237 Fed 563

Kelp Ore Remedies Corp. v. Brooten, et ux (1929) 129 Or 357, 277 Pac 716

with

Rafolovitz v. American Tobacco Co. (1893) 25 NYS 1036

In the absence of any such promise or consideration, the supposed agreement was so lacking in mutuality of obligation that it could be canceled at will by either party, and its "termination" by Merrill Lynch created no liability for damages.

During the course of the trial, the following colloquy occurred between the trial judge and Greenberg's trial counsel:

> "THE COURT: Have you abandoned your preliminary theory that there may have been some quid pro quo offered by way of a bilateral promise?
>
> "MR. JOLLES: Yes." (Tr. 251)

In light of such admission, the representation in Greenberg's appeal brief that the parties stipulated in the pretrial order that Merrill Lynch had agreed to accept orders from Greenberg to buy and sell sugar futures contracts up to a maximum of 300 contracts open at any one time is a particularly glaring misstatement of the record. (See Appellant's Brief, page 11, statement 9) In fact, the supposed "stipulation" is found in Greenberg's "Contentions," and not in "<u>The Statement of Agreed Facts</u>." (R. 60)

Greenberg's attempt to now resurrect the abandoned contention of a "binding contract" seems strangely misplaced, particularly in light of the evidence, or lack of evidence, on this phase of the case.

We conclude that Greenberg's trial counsel properly appraised his evidence when he informed the court that he was no longer relying upon a theory of a breach of an express or implied agreement.

4. <u>Greenberg presented no evidence sufficient to create a jury issue under Greenberg's theory of promissory estoppel</u>.

In the absence of a promise supported by ordinary consideration, Greenberg necessarily was forced at the trial to rely on a substitute for consideration.

The contention that Merrill Lynch's "promise" was made enforceable by some consideration substitute was not put in issue by pleadings or by contentions in the pretrial order. (R. 1-6, 60-63) At trial, when Greenberg conceded that there was no agreement and sought to change his ground from express agreement to promissory estoppel, Merrill Lynch objected. (Tr. 126-127) Thus, Merrill Lynch submits that the issue of promissory estoppel is not properly in this case, and could not have served as a basis for sustaining Greenberg's claims.

Although Merrill Lynch believes that the promissory estoppel theory finally advanced by Greenberg in lieu of

proof of an express agreement is not in this case, a discussion of this contention is necessary to an understanding of the trial court's disposition of Merrill Lynch's motion for directed verdict.

The trial court clearly indicated that it understood the law to be that the relationship between broker and customer is terminable at will upon immediate notice (Tr. 250), and that Greenberg therefore had the burden to show that the parties had modified the usual relationship by contract (Tr. 268-270). After Greenberg conceded that there was no agreement, the court noted that, taken at best, all the jury could conclude from the evidence was that Merrill Lynch had promised it would place up to 300 contracts "open" for Merrill Lynch, and that Greenberg in fact during 1965 had built up his position above the level of 100 contracts "open." (Tr. 269) However, in order to vary the basic principle of law that the broker-customer relationship is terminable at will upon immediate notice, Greenberg was required to show that there was an implied term in such relationship, adopted by reference to custom or practice in the industry, that the relationship was not terminable at will, but continued for a "reasonable" time. Thus, the crux of the matter, after the smoke from all the other claims had blown away, was whether Greenberg's expert testimony was sufficient to establish such custom.

The district court's remark that the expert testimony on this issue had not been very helpful (Tr. 269)is an under-

statement. In fact, Greenberg's expert, Mr. Engelmohr, stated, as an example of the kind of notice he thought customary in the industry, that he had done the very thing Greenberg accused Merrill Lynch of doing--that he had had occasion to "kick a man out" of his brokerage firm and ask him not to do business any more, and had immediately limited this customer's account to liquidating orders only without any other notice. (Tr. 132, 145) Greenberg's expert further stated that a broker can reduce "limits" any time it wants (Tr. 150), and that it can refuse orders (Tr. 141, 150), although it does not like to do so under normal circumstances.

The testimony of this "expert" (Engelmohr admitted that he did not consider himself an expert in the field--Tr. 140) not only failed to provide any evidence sufficient to go to the jury on the issue of notice, but in fact was completely destructive of the contention that notice was required. Mr. Engelmohr's whole testimony is commended to the court as an illustration of the fact that even expert witnesses do not always testify so as to permit inferences favorable to the party by whom they are called.

Even if Mr. Engelmohr had testified in support of Greenberg's contentions, the claimed breach of an "established custom" to give notice of an intent to decline future orders would not have supported any claim for the recovery of damages.

Blyth v. White (Ga, 1934) 176 SE 830, 832

> "In count 1 damages are alleged for loss caused by the acts of the defendants in closing plaintiff's account and refusing to further execute orders given by the plaintiff. While it is alleged that the defendants' refusal to pay the plaintiff the money in their hands belonging to the plaintiff was the direct and proximate cause of the plaintiff's loss, the plaintiff, in this court, is not seeking to recover that money as such. He is seeking to recover speculative damages for loss growing out of the defendants' refusal to further act as his brokers. It is nowhere alleged that there was any contract between the parties. While there are alleged facts which are evidentiary of a contract, there is alleged nothing tending to establish an obligation on the part of the defendants to continue as plaintiff's brokers, or to accept orders from the plaintiff for the sale and purchase of stocks, or to continue the purchase of unissued stocks without requiring the plaintiff to make any advances therefor. It is not alleged that the acts of the defendants complained of constituted a breach of a contract. It is alleged only that the acts of the defendants constituted a breach of 'established customs.' Count 1 of the petition therefore fails to set out any cause of action for the recovery of the loss or damage there alleged. For the same reason it does not appear from the allegations in count 4 that the defendants were under any obligation to accept any orders from the plaintiff. The allegation in this count that the defendant committed a breach of contract in refusing to execute the plaintiff's offer to buy stock failed to set out a cause of action." (emphasis added)

The evidence of other important elements necessary to create a promissory estoppel are also lacking. There was no evidence from which the jury could have found that Merrill Lynch promised to place orders for Greenberg up to 300 "open" contracts. The sole evidence of any such promise consisted of:

(a) Greenberg's discussions with Richard Emlaw, Greenberg's account executive, and Joseph DuLong, manager of Merrill Lynch's office in Portland, in connection with a specific transaction contemplating acceptance of delivery of up to 300 May 1965 contracts for import

into Guatemala. (See admonitions of trial judge to Greenberg, Tr. 28-32)

(b) Greenberg's single conversation with Thomas Cassady in New York when the parties were again discussing the delivery of actual sugar represented by the May 1965 contracts. (Tr. 41)

Nowhere was there any specific evidence to which Greenberg can point that the 300 contracts "open" limits discussed in those conversations had to do with anything other than the specific transaction then in progress involving importation of sugars into Guatemala.

Mr. Engelmohr's testimony was also destructive of the claim that "limits" set by a broker are in any way the subject of agreement. He testified that account "limits" are not agreed upon between broker and customer (Tr. 149), but that the broker, because of his exposure to liability for his customer's account (Tr. 143-144), makes the decision as to the size of account it wants to carry for a customer. The broker's decision is not a "two-way" street (Tr. 149), and the broker can reduce "limits" or even refuse orders (Tr. 150).

In summary, Mr. Engelmohr's testimony completely refutes the idea that notice was necessary in this case, or that there was any custom in the industry to give notice. It also negatives the concept that a broker's statement of the "limits" it will establish for an account is to be construed as a "promise" in any sense.

Under the evidence in this case, there was no promise upon which Greenberg could reasonably rely to continue to accept orders and do business. Even assuming, arguendo, that the elements of a promissory estoppel had been present, this frail substitute for a regular contract did not contain any term requiring Merrill Lynch to continue the relationship for any period of time. As the relationship was terminable at will, Merrill Lynch was not guilty of any breach of contractual duty in so terminating.

5. Greenberg's evidence does not support Greenberg's claim that Merrill Lynch breached any duty owed Greenberg.

In order to present the issues in this case in logical fashion, we have not attempted to answer each claim in Greenberg's brief in support of his contention that the evidence shows a breach of duty owed Greenberg by Merrill Lynch (See Appellant's Brief, paragraphs 1-11, pages 8-12) but have heretofore discussed the basic issues.

In answering these issues, we have necessarily discussed some, but not all, of the miscellaneous statements of the evidence claimed favorable to Greenberg. This section will answer the remaining claims of Greenberg as to the evidence which the jury might have considered.

Statement No. 1, page 8.

Greenberg did not testify that it was the custom of the trade to give notice under the circumstances involved here. Greenberg's testimony, read as a whole, was that he based his contention that notice was required on "just good common business

sense" (Tr. 192-195). No attempt was made to qualify Greenberg as an expert witness on this or any other matter, and his opinion has no more dignity as evidence of a custom in the industry than that of any other lay person.

Statement No. 2, page 8.

The statement that Greenberg testified without objection that it was understood between the parties that proper notice would be given does not accurately represent the testimony. Greenberg actually admitted that there had never been any discussion as to how long the limits of 300 contracts open would continue in effect and that the "proper notice" element was assumed by him but never discussed with Merrill Lynch (Tr. 92).

Statement No. 3, page 8.

Greenberg's purported "expert" admitted that he was not an expert in the field (Tr. 140). With respect to the custom and practice in the industry, Mr. Engelmohr testified that he had once had occasion on behalf of his brokerage firm to "kick" a customer out, ask him not to do business any more, and limit his account to liquidation trading only (Tr. 132). On cross examination, Mr. Engelmohr admitted that he had not given that particular customer any advance notice that the brokerage firm would handle only liquidating orders (Tr. 145). This testimony, of course, was completely contrary to the alleged custom of the trade which Greenberg claimed was regularly followed.

Statement No. 4, page 9.

In response to a hypothetical question, Mr. Engelmohr testified that he had not had any experience with a customer under circumstances similar to those in the case at bar, and that he could not conceive of its happening (Tr. 136). The misleading inference from Greenberg's brief is that Mr. Engelmohr testified in effect that Merrill Lynch's action was so wrongful and arbitrary that it was simply inconceivable that such a thing could be done. The whole tenor of the testimony, however, was simply that Mr. Engelmohr had never had any experience with the circumstances presented by the hypothetical.

Statement No. 5, page 9.

Mr. Engelmohr did not testify, as Greenberg suggests, that he had never in all his experience encountered such an act as Merrill Lynch committed, but simply that he had never had direct experience himself in a case like this (Tr. 159, lines 2-3) and had never had the experience of a brokerage house reducing an account below agreed-on "limits" (Tr. 152).

Statement No. 6, page 9.

Joseph Frommer testified that it was not the practice in the industry to force somebody within a day or two to "move out" of a large position (Tr. 214, lines 21-23). Mr. Frommer's testimony does not support Greenberg, for Greenberg was not forced to liquidate or "move out" of the position he then held. Merrill Lynch simply refused to accept and execute orders <u>for</u>

new contracts which would increase the size of his position. Greenberg himself admitted that he had been given adequate time to reduce his existing position (Tr. 198).

Statement No. 7, page 9.

Greenberg's contention as to notice requirements imposed by law has heretofore been discussed in this brief, pages 24 through 29.

Statement No. 8, page 10.

The argument advanced in this section has been discussed at some length in the previous section on promissory estoppel. As the trial court noted, the best that could be said for this evidence is that the jury might infer there was some kind of a promise and that Greenberg relied thereon. There was no evidence, however, whether by proof of custom in the trade or by express agreement, that such "promise" would remain in effect for any stipulated period of time (Tr. 269).

Statement No. 9, page 11.

The parties did not "agree" in the pretrial order that Merrill Lynch had agreed to accept up to a specified number of orders from Greenberg. Instead, the quoted statement is a "contention" which Greenberg made and admittedly failed to prove (Tr. 251).

Statement No. 10, page 11.

The statement quoted by Greenberg is patently out of context and does not accurately reflect any finding of the district court. The court's statement was made in the course of a discussion of the issue of punitive damages. In essence,

the court's remark was that, even if the jury should accept Greenberg's testimony, the most that the jury could find was that there was a breach of contract, but not a breach of fiduciary relationship (Tr. 113). Accordingly, there would be no basis upon which punitive damages could be allowed.

Counsel for Greenberg subsequently admitted that there was no contract between the parties (Tr. 251). In light of that admission the statement that the jury could infer the requirement of advance notice prior to change of the contract is without foundation.

<u>Statement No. 11, page 11</u>.

Greenberg is correct in stating that the "limits" of 100 "open" or any "limits" could be changed by Merrill Lynch without notice. As Greenberg's own expert testified, "limits" are simply credit guide lines established unilaterally by the broker for its own benefit in determining the amount of purchases and the extent of the risk that it might assume on margin for any given customer (Tr. 148-150). A broker does not obligate itself to accept new orders merely by notifying a prospective customer as to its thinking, i.e., "limits," on what the maximum size of its customer's account should be. Consequently, Merrill Lynch, in notifying Greenberg of any "limits" on his account with Merrill Lynch, never at any time "agreed" to place for Greenberg any orders for sugar futures contracts.

6. Greenberg presented no evidence of compensable damages.

In passing on Merrill Lynch's motion, the court remarked that Merrill Lynch's "promise" was not breached because it could be terminated and had to be terminated within the custom of the trade, and that there was no evidence that the termination was in any other way. The court granted the motion on that ground, and on the additional ground that "the damages which were attempted to be proved in this case were entirely speculative, attempting to place orders which Mr. Greenberg knew would not be accepted and executed." (Tr. 270)

In his argument concerning the damage issue, Greenberg again attempts to assert that the court should have made factual findings; that the court's remarks can be taken as a determination of factual issues; and that it was error for the court to make such findings. (Appellant's Brief, page 12) As on the question of breach of agreement, however, it is apparent that the trial court did not make a "finding" concerning a disputed fact issue, but simply ruled that there was no evidence over which reasonable men could differ which supported a claim for damages.

a. Greenberg's claim for damages was purely speculative.

In the course of pretrial proceedings, Merrill Lynch urged the court to consider whether the claim for damages as

asserted by Greenberg was the proper measure of damages. (R. 474-478) That question was thoroughly briefed in pretrial memorandums (R. 419-429, 459-480) and ruling thereon was reserved (R. 481). At the end of Greenberg's evidence, Greenberg suggested to the court the application of "value of a chance" theory which had been presented by Merrill Lynch (Tr. 252, 262). Greenberg's present counsel now seeks to assert that competent evidence of damages was in fact presented in accordance with the proper measure of damage rule.

Merrill Lynch submits that no competent evidence of damages was submitted under the proper measure of damage rule.

It is the general rule, both in Oregon and elsewhere, that loss of prospective profits which are remote and speculative cannot be recovered as damages for breach of a contract.

> Weaver v. Austin (1948)
> 184 Or 586, 601, 200 P2d 593
>
> Western Rebuilders, Inc., v.
> Felmley (1964) 237 Or 191,
> 203, 386 P2d 813, 391 P2d 383

Greenberg's claim was solely for the loss of prospective profits he claims he would have made if Merrill Lynch had not refused to place orders for the purchase or sale of contracts not already held in his account. (Ex. 75) Greenberg does not claim that he was forced to liquidate contracts already held at a loss, or that he suffered any loss on his transactions in the actual commodity.

Further, there was no claim of actual monetary injury, even as to orders Greenberg claims he was prevented from placing. Greenberg contended that the paper book value of the contracts would have increased as of a certain date, and that his damages were measured by the difference between what the contracts would have cost if purchased and their paper value on the later date (R. 427). The fallacy in that argument, as Greenberg's trial counsel apparently ultimately recognized, is that there can be no profit until a sale is made, and Greenberg did not claim he would have sold the contracts on the date in question. If he had not made a sale, of course, the paper profit would never have been realized, and, if not realized by a sale, would have disappeared immediately as the market began to swing the other way. (Ex. 180) The fact is, as the district court noted, that Greenberg arbitrarily selected the one day on which the contracts showed a paper appreciation as the date to "value" the contracts. (Tr. 270)

For the same reason, any argument that Greenberg suffered monetary damage because he would have been entitled to withdraw money from his account on the day in question is without merit. A customer is entitled to withdraw money from his account when it becomes "overmargined" by appreciation of the value of the contracts. He is also required, however, to put up additional money when his account is "undermargined." Because the market fluctuates constantly, it would be impossible to determine whether a profit or loss had ultimately been made on the transaction until the contract

had been disposed of and it had been determined whether withdrawals exceeded amounts required to maintain margin. Thus, until a transaction has been closed out, the question whether it would have been profitable is necessarily based on speculation.

Finally, and most importantly, there was no evidence that Greenberg would have suffered any loss if he had later actually replaced his orders for the same contracts with his new broker, because there was no evidence that the contracts were not available at the same prices at a later date. In fact, Greenberg could have purchased the same contracts through his new broker at a more favorable price. (Ex. 180)

The authorities cited by Greenberg in his attempt to justify his theory of damages do not support a claim for damages under the circumstances present here. They fall within the following categories:

1. Where the specific order was accepted by the broker but negligently carried out.

2. Where the broker converted stocks or commodities presently held by its customer by selling without the customer's approval.

The class of cases involving conversion is entirely irrelevant. There was no claim for conversion made by Greenberg; he was not forced to sell contracts held in his accounts; and he had adequate time to sell such contracts on the dates he chose. (Tr. 198)

The cases cited by Greenberg in the first category are also only remotely in point. There is a clear distinction between a case in which an order is given to purchase or sell commodities contracts not presently held in the customer's accounts, and an order to sell commodities contracts which are presently held in the customer's account.

Meyer, Stockbrokers and Stock
Exchanges, Section 134,
page 545

Merrill Lynch urges that, in the case of an order contemplating an originating transaction, damages should not be recoverable unless the customer actually had the order executed elsewhere. Unless the order has been executed elsewhere, damages are purely speculative.

Gurley v. MacLennan
(DC, 1900) 17 App Cases 170

Greenberg does not even apply the rule laid down by his own authorities, but instead asserts a new measure of damages not recognized by any authority; i.e., the difference between the order price and the market price as of a date arbitrarily selected by Greenberg to "value" the contract. Such a theory of damages is without rational justification as it is impossible to determine whether Greenberg in fact would have made a profit or suffered a loss.

b. If Greenberg had suffered any damages, they could only have been measured by the "value of the chance" to make a profit at the time of the alleged breach of contract.

Properly analyzed, Greenberg's claim is simply that he was deprived of a chance to make short-swing profits on new orders because Merrill Lynch refused to handle new business for him on margin.

In essence, this claim is equivalent to the contention that Merrill Lynch breached its agreement to loan up to a certain amount of money to purchase sugar futures contracts. In accordance with the rule prohibiting speculative damages, a claim for loss of profits for breach of such agreement is not allowable as a matter of law.

> Farabee-Treadwell Co. v. Union
> Planters' Bank & Co. (Tenn,
> 1916) 186 SW 92

As we have pointed out, Greenberg did not claim that Merrill Lynch accepted orders and negligently failed to carry them out. The contract "right" which Greenberg claims was breached was the right allegedly acquired in the "agreement" or "promise" of March, 1965, to be able to place future orders and acquire not in excess of 300 "open" sugar futures contracts. However, an agreement to accept future orders, such as was relied on by Greenberg in this case, is not the equivalent of an agreement to accept a specific order to buy or sell a stated quantity of stocks or commodities at a given price, particularly insofar as the element of certainty of loss of profits is concerned.

Where a specific order has been accepted by a broker, the right breached upon failure to execute the order is the right to receive a stipulated quantity of stocks or commodities

contracts at a given price. On the other hand, notification of an intent to refuse future orders may, in a proper case, violate the offeree's right to enter into future transactions. As the terms of price and quantity are necessarily not known by either party at the time of such breach, the element of certainty is entirely missing. Whether any such future transaction, if made, would be profitable or unprofitable is a matter of chance which cannot be determined except through hindsight. It was undoubtedly for this reason that the district court remarked that Greenberg's orders were hypothetical. The alleged breach had already occurred, and Greenberg, knowing such orders would not be accepted, then attempted to place orders.

In cases like this where the realization of profits is contingent upon an uncertain event, the courts have developed an alternative measure of damages. This measure of damages has been referred to as the "value of a chance." See

> 5 Corbin on Contracts,
> Section 1030

Compare

> Western Union Tel. Co. v.
> Crall (Kan, 1888) 18 Pac 309

with

> Wicks v. Knorr (Conn, 1931)
> 155 A 816
>
> Wachtel v. National Alfalfa
> Journal Co. (Iowa, 1920)
> 176 NW 801

This is the measure of damages which Greenberg at trial suggested might be applicable. However, even under this theory, Greenberg did not, as a matter of law, suffer any damage, nor more importantly, did he present any proof in support of such theory.

The value of Greenberg's "right to compete" (i.e., right to speculate on the rise or fall of the commodity market) was entirely speculative and, therefore, no damages could be recovered in this case. At the time Merrill Lynch gave Greenberg notice that it would accept liquidating orders only (the time of the alleged breach), Greenberg had no orders pending with Merrill Lynch. As there would have been no way of knowing at that time what orders Greenberg might place, the "value of the chance" given by Greenberg's alleged contract right is nothing, because the probability of a gain is so remote that the necessary certainty to measure such a gain is entirely lacking. In light of the admitted facts in this case, the district court properly directed a verdict for Merrill Lynch on the additional ground that there was no evidence of damages.

POINT II

THE TRIAL COURT PROPERLY REMOVED THE ISSUE OF PUNITIVE DAMAGES FROM THE JURY.

Greenberg assigns as a second major ground of error the district court's ruling removing the issue of punitive damages from the jury's consideration.

The claim that the court erred at the end of the first day of trial in withdrawing the issue of punitive damages from the case appears to be just extra frosting on the cake, as the district court's action, even if erroneous, would not provide a basis for reversal. If Greenberg failed to prove his claim for general damages, he may not recover exemplary damages, because there can be no cause of action for exemplary damages alone. Not only must Greenberg establish his claims, but proof of actual damages is a prerequisite, and the jury could not have awarded exemplary damages unless it first found some basis for and actually made an award of general damages.

Weaver v. Austin (1948)
184 Or 586, 200 P2d 593

Martin v. Cambas (1930)
134 Or 257, 293 Pac 601

Thus, if the trial court's ruling that there was no breach of contract and no damages is correct, the issue of punitive damages is out of the case automatically and need not be considered on appeal.

A. Exemplary damages may not be awarded for breach of contract.

Aside from the fact that Greenberg's second assignment of error does not constitute a ground for reversal, the district court's ruling was clearly proper as a matter of law. Punitive damages may not be awarded for breach of contract under Oregon law.

Weaver v. Austin (1948)
184 Or 586, 200 P2d 593

Smith v. Abel et al (1957)
211 Or 571, 316 P2d 793

There was no evidence presented, or to be presented, in this case of malicious conduct attending the alleged breach of contract which could provide a basis for an award of exemplary damages. (Tr. 107-113) Even taking the arguments asserted in Greenberg's brief at their best (and the exhibits relied upon are not in evidence) this was not the type of case where exemplary damages could be awarded.

5 Corbin on Contracts, Section 1077, 437, 440

Corbin points out that in those few jurisdictions where the courts have allowed the jury to consider the issue of exemplary damages in connection with a claim for breach of contract, there were elements which enabled the court to regard them as falling within the field of tort. Some of the cases have involved actions against public service companies (where there is an extra duty of care imposed by law, independently of contract); some have involved a breach of promise of marriage (usually accompanied by seduction). A third class of cases where the damages have sometimes been described as punitive are cases where depositors have sued their bankers for failure to honor checks or drafts. In these cases, the jury is allowed to award exemplary damages for intentional injury to the depositor's credit.

Greenberg has cited certain cases in support of the proposition that exemplary damages are recoverable for breach of contract. However, these cases actually support Merrill

Lynch's contention that punitive damages are recoverable only where the wrong arises primarily out of some intentional tort. For example, in

Harper v. Interstate Brewery Co. (1942)
168 Or 26, 120 P2d 757

defendants at the close of the evidence moved to require plaintiffs to elect whether they were proceeding in contract or in tort. Plaintiffs elected to proceed in tort.

The significance of the fact that the Harper case was in tort has been noted in an article on the doctrine of punitive damages.

Hodel, The Doctrine of Exemplary Damages in
Oregon, 44 Or L Rev 175, 198-199 (April, 1966)

> "The defendants argued with great vigor that the plaintiff's cause of action was in contract. The Oregon court held that this was a tort action and upheld an award of compensatory and exemplary damages. The fact that the court found it necessary to consider at length the question whether this was an action in tort or contract before allowing exemplary damages, lends support to the view that such damages were considered available only in tort actions."

The well-known case of

Brown v. Coates (DC Cir 1957) 253 F2d 36, 39

also supports Merrill Lynch's contention that exemplary damages may be awarded only in cases in tort where the contract is merely incidental to the acts complained of. In the Brown case, plaintiffs were induced to enter into an exchange agreement with defendant broker, under which the broker was to convey a new house to plaintiffs (subject to encumbrances), and plaintiffs were to convey their old house to defendant broker

(subject to certain encumbrances). The literal effect of the contract was that plaintiffs were to convey a house worth $13,000 to $15,000, in which they had an equity of $9,000, and receive a house worth $14,000 to $17,000, in which they would have no equity, but would be required to pay $14,500.

When defendant sold plaintiffs' old house, he refused to credit any part of the proceeds to plaintiffs. Plaintiffs then brought an action, claiming that, notwithstanding the written agreement, the actual agreement between the parties was that defendant would sell the old house, deduct an agreed commission, and apply the net proceeds of the sale to reduction of the debt on the new house. It is clear from the facts of the Brown case that the contract there in question was only the instrument by which the broker carried out his fraudulent scheme, and that the case did not involve the breach of an ordinary commercial agreement.

The Oregon court, in a case somewhat similar to the Brown case, has ruled that exemplary damages were properly eliminated by the trial court.

Ridgeway v. McGwire (1945)
176 Or 428, 441, 158 P2d 893

Oregon law is, of course, controlling on the substantive issue whether exemplary damages may be allowed in this case.

B. No fiduciary relationship existed between Greenberg and Merrill Lynch.

As stated above, exemplary damages may not be allowed for breach of contract. Greenberg contends, however, that there

was some fiduciary relationship over and above the contract, the breach of which should entitle Greenberg to recover exemplary damages.

Greenberg does not explain how a fiduciary relationship arose in this case. The parties clearly were dealing at arm's length. There was no claim that Merrill Lynch had superior knowledge, that it had any position of advantage, or that, because of the nature of the business, there were additional duties imposed by law (as would be the case with a public carrier). Greenberg does not even explain what kind of fiduciary duty was breached, but simply claims that Merrill Lynch refused to have further business dealings with him.

Aside from the fact that there was no peculiar relationship of trust and confidence, it is not possible to imply such relationship from the fact Merrill Lynch had previously accepted and executed orders for Greenberg. See
<u>Walston & Co. v. Miller (Ariz 1966) 410 P2d 658</u>.

In the <u>Walston</u> case, the broker brought an action for the balance owing when defendant Miller's commodity account was closed out. Miller counterclaimed, alleging that Walston owed Miller a duty to timely notify Miller of certain information which might affect prices on the world sugar market. Miller contended that Walston's failure caused him to lose money deposited with Walston and, in addition, to lose certain profits.

In reversing an award of damages for Miller, the court held that, at the time of the acts complained of, there was no "fiduciary relationship" between the parties.

Greenberg's argument that a commodity broker's duties do not terminate upon execution of an order to buy or sell, but continue for a long time thereafter while it carries out contracts entered into in its own name with the exchange, is patently designed to explain away the Walston case, although Greenberg carefully avoids mentioning the Walston case by name. This argument fails, however, for the same reason the argument that the broker-customer relationship is not terminable at will failed. The authorities in both areas, without exception, clearly state the rule to be that the broker-customer relationship is terminable at will upon immediate notice, while only the secondary relationship of pledgor-pledgee requires substantial advance notice. The court in Walston, as in the instant case, was not concerned with the secondary relationship of pledgor-pledgee which arises both where the broker carries stocks on margin for his customers, and where he carries commodities contracts on margin for his customers, but with the first relationship, which terminates upon completion of each order.

The distinction between the right of the broker to terminate the relationship, even while he is carrying a margin account for his customer, see

> Robinson v. Ungerleider (Pa 1933)
> 169 A 886,

and the right to terminate the secondary relationship of pledgor-pledgee by a forced sale goes to the very heart of the issues here, because Greenberg does not claim to have suffered any damages as a result of breach of the secondary relationship.

C. <u>There is no evidence in this case of malice or of aggravating circumstances</u>.

As pointed out above, Greenberg has been, and was when asked by the trial court, unable to point to any breach of duty or to any evidence of intent to cause harm, other than the alleged breach of contract in refusing to enter into future business transactions. Merrill Lynch does not, of course, accept Greenberg's statement that the mere existence of a fiduciary relationship (if in fact such relationship existed) coupled with a simple breach of contract, is sufficient to justify an award of punitive damages. The fiduciary's breach must be tortious and committed with an intentional disregard of the rights of the other party. In short, there must be some evidence of fraud, overreaching, secret profit-taking or the like. There was none.

The 14 contentions made by Greenberg on pages 19 and 20 of his brief make no mention of any deliberately wrongful act. At best, contentions 1 through 5 constitute a claim that Greenberg and Merrill Lynch had normal business dealings over a period of time.

Contentions 6 through 8 mention the fact that Greenberg was dealing with actual sugars. However, Greenberg claimed no damages whatever on account of losses caused by dealings in the actual sugar market. If Greenberg had suffered any such damages, there can be no doubt but that a claim of this nature would have been asserted.

Contention 13 is also irrelevant, because Greenberg claimed no damages from being unable to "protect himself." His claim was simply that he would have made a profit on new transactions, had he been allowed to buy and sell new contracts.

Contentions 9 through 12 presumably are intended as support for the claim that Merrill Lynch recognized that it had some duty to Greenberg, but acted in deliberate disregard of that duty. Contentions 11 and 12 are misrepresentations of the actual testimony (see discussion, pages 30 and 31 herein). The statement in contention 10 is not evidence at all, but simply Greenberg's hearsay testimony of other hearsay.

Greenberg's contention 9 is also erroneous. Exhibits 14 and 15 show that the decision to limit Greenberg to liquidating orders only was not made until October 21, 1965. Greenberg admitted that a representative of Merrill Lynch's Portland office had tried to contact him on that date, but he had not returned the telephone call. (R. 57) The actual wire informing the Portland office of the commodity department's final decision was not sent until October 22, 1965. (R. 57)

Greenberg's contention 14, based upon exhibits that were never admitted into evidence, is without basis in fact or logic. Greenberg does not explain what the significance of the proposed exhibits is, except as to Exhibit 190. His explanation of Exhibit 190, however, borders on the fantastic. Greenberg claims that Merrill Lynch limited his account to liquidating orders because it was in an exposed position in

the market, compared with its normal activities. There is no indication what Merrill Lynch's "normal activities" in the market are. Even if Merrill Lynch had been in an exposed position in the market, however, the action taken would not reduce its exposure. In order to reduce its position, Merrill Lynch would have had to force a sale of the contracts then in Greenberg's account. In fact, this did not occur, and Greenberg continued to hold the contracts in his account until they were gradually reduced months later and the balance transferred to his new broker. (Tr. 198) Limiting Greenberg to liquidating orders would not reduce Merrill Lynch's exposed position, but would only continue the status quo.

In conclusion, the trial court properly concluded that neither the type case, nor the evidence presented, justified the submission of an issue of punitive damages to the jury.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING GREENBERG'S MOTION TO AMEND HIS PLEADINGS TO ADD A CAUSE OF ACTION BASED ON AN ALLEGED VIOLATION OF THE ROBINSON-PATMAN ACT.

In August, 1967, 19 months after this case had been filed, and little more than a month before the date set for trial, Greenberg moved to amend his complaint to assert alleged violations of the Robinson-Patman Act (15 USC 13(c)). (R. 450) At the same time, Greenberg filed numerous and complex interrogatories directed at such issues. (R. 437-449)

The trial court, after considering several briefs, denied Greenberg's motion.

Greenberg asserts that the trial court's refusal to allow the motion to amend constitutes reversible error.

A. <u>The trial court did not abuse its discretion in denying Greenberg's motion to amend</u>.

As the grant or denial of an opportunity to amend is within the discretion of the district court under Rule 15a of the Federal Rules of Civil Procedure, the court's action cannot be reversed unless the court abused its discretion.

There is justification for allowing amendment where the amendment seeks only to cure an imperfectly stated cause of action. In the cases cited by Greenberg, the proposed amendment merely stated an alternative theory based on the same operative facts, or added some fact necessary to state a complete cause of action. In most of the cases, the complaint had been dismissed for failure to state a claim on which relief could be granted, and the plaintiff would be out of court if the amendment were not allowed. The district court's refusal to allow an amendment to cure an imperfectly stated claim where a genuine claim exists may legitimately be considered an abuse of discretion, because the plaintiff is left without remedy.

It is not an abuse of discretion to deny a motion to amend, however, where there is a justifiable reason for the denial and the claim is independent of the original cause of

action and will not be barred if the motion to amend is not allowed. In the instant case, Greenberg's new claim involved an entirely new set of operative facts and a new theory of law. No discovery had been had on the claim (although Greenberg proposed to institute such proceedings), and the motion to amend was filed 19 months after the case had been instituted and within one month of the date set for trial. The new claim was clearly of the sort which could be asserted in an independent action and would not be barred by the trial court's refusal to allow amendment. Under the circumstances, the motion to add a new claim was properly denied. See:

Suehle v. Markem Machine Company (ED Pa, 1965) 38 FRD 69

Portsmouth Baseball Corporation v. Frick (SD NY, 1958) 21 FRD 318

As a side issue, Greenberg also contends that the amendment should have been allowed because Merrill Lynch had resisted discovery proceedings so extraordinarily that the new issue could not have been raised sooner. Greenberg cites a much abbreviated schedule of docket entries in support of his contention.

The record discloses no improper action on Merrill Lynch's part in opposing certain of Greenberg's discovery tactics.

The facts are that Merrill Lynch promptly made available to Greenberg and his counsel all documents and records in its Portland, Oregon, office. In May, 1966,

Greenberg's counsel took testimony by abbreviated depositions of certain of Merrill Lynch's officers in New York City, at which time documents in its New York office were produced for inspection. A year later Greenberg's counsel took intensive testimony by deposition of Merrill Lynch representatives in New York City.

At no time in the course of the discovery proceedings did Greenberg inform the trial court that he was seeking information in support of a new claim for breach of the antitrust law.

Further, what Greenberg does not disclose is that Greenberg propounded an additional set of complex and lengthy interrogatories on August 4, 1967, when he moved to amend his complaint to include the antitrust claim. (R. 437-449) This set of interrogatories was relevant only to the antitrust issues which Greenberg sought to introduce. (Pretrial Conf. Tr. 27) The trial court, in ruling on Greenberg's motion to amend complaint, undoubtedly had in mind that Greenberg just prior to trial was initiating discovery on an entirely new issue, and that, because it purportedly involved matters which took place solely in England, discovery would be a time-consuming process.

It also should be noted that some of the delay in discovery proceedings on both sides was occasioned when Greenberg's first set of counsel withdrew and Greenberg obtained new counsel. (R. 367) Answers to Merrill Lynch's interrogatories were delayed on this ground for three months. (R. 315, 368)

In conclusion, there is no basis for any contention that Merrill Lynch acted without justification in opposing certain of Greenberg's discovery requests. Merrill Lynch had a legitimate concern for, and the right and obligation to protect, the privacy of its customers' records. The fact that it did so should provide no comfort for Greenberg in his argument that the trial court improperly denied his motion to amend his complaint.

CONCLUSION

Merrill Lynch respectfully submits:

1. The trial court did not err in dismissing Greenberg's cause of action for damages arising out of Merrill Lynch's declination to Greenberg to place further orders for new sugar futures contracts.

2. The trial court did not err in removing the issue of punitive damages from the case.

3. The trial court did not abuse its discretion in denying Greenberg's motion to amend his pleadings to add a new cause of action alleging a violation of the Robinson-Patman Act.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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APPENDIX A

Definition of Terms

To aid the court in understanding the nature of the claims and defenses that were asserted by the parties in this case, the following explanation of terms is submitted. This explanation paraphrases in part the statement in Volkart Brothers, Inc., v. Freeman (5th Cir, 1962) 311 F2d 52

1. Position. A person engaged in the production or importation of sugar or in the manufacture of products containing sugar may deem it necessary to contract to purchase or sell sugar for future delivery through the commodities exchange. Contracts on the exchange call for the purchase or sale of a stipulated amount of sugar for delivery during a specified month 1 to 15 months from the date the contract is made. A person who buys or sells a sugar future contract takes a "position" on the exchange.

2. Hedge. One of the primary reasons for taking a "position" on the exchange is to offset commitments in the actual commodity, and thus insure or "hedge" against price fluctuations. For example, a merchant who contracts to sell sugar to a mill to be delivered in six months may not yet have the actual commodity. Accordingly, in entering into a contract with a mill, the merchant takes the risk of a change in price by the time he must acquire sugar to fulfill his commitment to the mill. To guard against a change in price, the merchant takes a "long" position on the sugar futures exchange by making

a contract to purchase for future delivery. If the price of actual sugar increases during the period, the price of sugar on the futures market will tend to increase correspondingly and the loss the merchant sustains by having to pay a higher price for actual sugar will be offset by his gain on the futures market when he closes out his futures contract at a profit. Such a transaction is defined as a hedge against actuals.

A hedge against actuals may also involve a "short" position on the futures market. A person taking a "short" position contracts to sell sugar for future delivery on the exchange to offset the risk of a decline in value of his existing inventory of the physical commodity.

Commodities contracts on the exchange may also be offset or "straddled" against each other. Speaking generally, if a person is long 100 contracts on the exchange and short 50 contracts, his "position" on the exchange is commonly referred to in the trade as 50 contracts straddled and 50 contracts net long or "open" (i.e., 50 long contracts for which there are no offsetting short contracts).

3. <u>Speculator</u>. In addition to producers, dealers, or manufacturers who use commodity exchanges to insure against the risk of price fluctuations in the actual commodity, the exchange is used by persons who buy or sell sugar futures contracts with the expectation of buying or selling the contract at a gain before the delivery month. Such persons are generally not dealing in the actual commodity, but use the exchange in

the expectation of making a cash profit from price fluctuations. Because the speculator generally does not put up the full amount of the contract when he takes a position, but deposits only a small percentage of the contract price with his broker, there is a certain leverage factor, and it is possible to make sizable profits or incur sizable losses in a short period of time.

4. Operation of the market. For every person who contracts to purchase sugar on a futures exchange, there must necessarily be a corresponding person who contracts to sell.

Contracts on the exchange are not made directly by the parties in interest, but by members of the exchange who enter into contracts on behalf of their customers with other members also acting for their customers.

A contract on a futures exchange may be disposed of either by offset, or by delivery and receipt of warehouse receipts for the physical commodity. Disposition of contracts by offset may be accomplished where a person having a long position enters into a contract to sell. His purchase and sale contracts then offset each other and are transferred off by his broker. Likewise, a person having a short position may enter into a contract to purchase, and his sale and purchase contracts offset each other. Contracts not offset remain "open" and, if open on the last trading day, must be performed by delivery of the actual physical commodity by the person who is short, and the receipt and payment therefor by the person

who is long. (It should be noted that short contracts for different months than long contracts do not offset each other, and that it is thus possible to have both short and long contracts in an account--the type of position known as a "straddle.")

The liquidation of futures contracts on an exchange by offset instead of by delivery is generally to be expected because of the manner in which the exchange is utilized. The speculator does not deal in the actual commodity, but uses the exchange to make a cash profit from fluctuations in prices. The hedger, who deals in the commodity, also is generally interested in liquidating his futures contracts, because any loss he sustains on his commitments in the actual commodity is expected to be offset by profits on the futures market.

Despite the fact that most contracts on futures markets are liquidated by offset, the parties to the futures contract have the obligation to deliver or take delivery of the commodity unless the contract has been liquidated by offset on the exchange. As futures contracts made on the exchange are binding until fulfilled by delivery and payment, and contracts entered into with an understanding that they are not to be so fulfilled are forbidden by the rules of the New York Coffee and Sugar Exchange, the transactions on the exchange are considered legal contracts and not mere wagering agreements.